

**INTHEUNITEDSTATESDISTRICTCOURT
FORTHEEASTERNDISTRICTOFPENNSYLVANIA**

UNITED STATES	:	
Respondent	:	CIVIL ACTION
	:	NO. 96-8145
	:	
v.	:	
	:	CRIMINAL ACTION
	:	NO. 95-412
HERBERT R. HILL, JR.	:	
Petitioner.	:	

MEMORANDUM AND ORDER

Yohn, J.

November, 1997

Herbert R. Hill, Jr. ("Hill") brings this motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his prison sentence. Hill is serving a 151 month sentence that this court imposed after he pleaded guilty to a one-count Information charging him with bank robbery in violation of 18 U.S.C. § 2113. Hill did not appeal his conviction or his sentence.

Hill raises several grounds for relief under § 2255. First, he argues that he was denied effective assistance of counsel at the sentencing hearing in violation of his Fifth and Sixth Amendment rights. See Amended Motion to Vacate, Set Aside, or Correct Sentence ("Amended Motion") ¶ 1. Second, Hill contends that the government breached its plea agreement with him. See Amended Motion ¶¶ 2, 3. Third, Hill challenges the court's use of his prior related indecent assault conviction to enhance his sentence under United States Sentencing Guideline ("USSG") § 4B1.1. See

Amended Motion ¶¶ 4, 5. For the reasons stated below, Hill's motion will be denied.

Background

On May 6, 1995, Hill went to the Philadelphia Police Department and confessed to having robbed the Midlantic Bank, located at 1201 Chestnut Street in Philadelphia, Pennsylvania, four days earlier. See Pre-Sentence Investigation Report ("PSI Report") ¶¶ 10-12. On May 23, 1995, Hill was arrested in connection with this robbery. At that time, he gave a statement to the FBI in which he confessed to having committed two other bank robberies in addition to the May 2 robbery. Specifically, Hill confessed to having robbed the Core States Bank, located at 1500 Market Street, Philadelphia, Pennsylvania, on March 31 and again on May 11 of that year. See id. ¶ 17.

Hill entered into a written guilty plea agreement with the government. The agreement contained stipulations between Hill and the government relating to the calculation of his sentence for the May 2 robbery. Paragraph 11.b of the agreement provided that both parties expressly disagreed over the applicability of the career offender guideline of USSG § 4B1.1(c) and that each party reserved the right to present its position to the court and to the United States Probation Department. See Guilty Plea Agreement ¶ 11.b. On September 12, 1995, in accordance with the plea agreement, Hill pleaded guilty to a one count Information charging him with the May 2 bank robbery. See Arraignment/Plea Hearing at 34.

The Pre-Sentence Investigation Report ("PSI Report") characterized Hill as a "career offender" and recommended that the court apply the sentencing enhancements of USSG § 4B1.1. At the sentencing hearing, Hill's attorney did not dispute Hill's status

as a career offender. See Sentencing Before the Honorable William H. Yohn, Jr., December 13, 1995 (“Sentencing”) at 3. However, Hill’s attorney filed a motion under USSG §§ 5K2.16 and 5K2.0 for downward departure from the applicable guideline sentencing range, based on Hill’s voluntary disclosure of the bank robbery. See Defendant’s Sentencing Memorandum and Motion for Downward Departure From the Sentencing Guidelines; Sentencing at 3-7. The court denied sentencing counsel’s motion and adopted the guideline application recommended in the PSI Report. It found that Hill’s appropriate offense level was 29 and his appropriate criminal history category was 6, yielding an imprisonment range of 151 to 188 months. See Sentencing at 3. The court sentenced Hill to serve 151 months in prison. See id. at 33.

Hill did not file a direct appeal of this court’s sentencing decision. Instead, he filed a pro se motion to modify his term of imprisonment, pursuant to 18 U.S.C. § 3582(c)(1)(B). See Defendant’s Memorandum to Modification of an Imposed Term of Imprisonment Pursuant to 3582(c)(1)(B). In a memorandum and order dated September 26, 1996, the court denied Hill’s motion. See United States v. Hill, 95 Crim. 412, 1996 WL 550667, Memorandum and Order, September 26, 1996. On December 9, 1996, Hill filed a pro se motion to vacate, set aside, or correct his sentence, pursuant to 28 U.S.C. § 2255. See Motion Under 28 § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody.” The court appointed Rocco C. Cipparone, Jr., Esq. to represent Hill and granted Cipparone leave to file an amended motion. See United States v. Hill, 95 Crim. 412, Order, March 6, 1997.

On May 15, 1997, Cipparone filed an amended motion for relief under 28 U.S.C. § 2255. See Amended Motion to Vacate, Set Aside, or Correct Sentence (“Amended

Motion"). At a n e v i d e n t i a r y h e a r i n g h e l d o n A u g u s t 21, 1997, Hill withdrew his prose motion. The amended motion is now before the court.

Discussion

Section 2255 permits a prisoner in custody under sentence of a federal court to move that court to correct an erroneous sentence. Under § 2255, the sentencing court is authorized to discharge or resent a defendant if it concludes that "the sentence was imposed in violation of the Constitution, or laws of the United States, or ... is otherwise subject to collateral attack." 28 U.S.C. § 2255. The court may grant a § 2255 motion, however, only if the alleged error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice." Hill v. United States, 368 U.S. 424, 428 (1962).

The Court of Appeals for the Third Circuit ("Third Circuit") has emphasized that a § 2255 proceeding should not be a substitute for a direct appeal of alleged errors in a sentencing proceeding. See United States v. Essig, 10 F.3d 968, 979 (3d Cir. 1993) ("[Section] 2255 is no longer a necessary stand-in for the direct appeal of a sentencing error because full review of sentencing errors is now available on direct appeal."). If a convicted defendant fails to raise his objections at his sentencing hearing or on direct appeal, the court will generally deem these objections waived. See United States v. Frady, 456 U.S. 152, 162-66 (1982); Essig, 10 F.3d at 979. In order to obtain collateral relief, the defendant must then show both "cause" excusing his procedural default and "actual prejudice" resulting from the errors of which he complains. See Frady, 456 U.S. at 167; Essig, 10 F.3d at 979. The defendant, however, need not show "cause and

prejudice”whenheraisesaclaimofineffectiveassistanceofcounselforthefirsttimein a§2255motion. See UnitedStatesv.DeRewal, 10F.3d100,104(3dCir.1993); UnitedStatesv.Nahodil, 36F.3d323,326(3dCir.1994).

I. INEFFECTIVEASSISTANCEOFCOUNSEL

Hillcontendsthathissentenceshouldbevacatedbecausehewasdenied effectiveassistanceofcounsel,inviationofhisFifthandSixthAmendmentrights. SeeAmendedMotion¶1. Specifically, Hillarguesthathisattorneysshouldhave challengedthegovernment'srecommendationthatHillqualifiedasa“careeroffender” underUSSG§4B1.1. SeeAmendedMotion¶1(c)-(e). Inaddition, Hillfaultshis sentencingcounselforhavingfailedtosetforthseveralalternativegroundsforrelief whenhefiledhismotionfordownwarddeparture,andforhavingfailedtourgethe governmenttofileitsownmotionfordownwarddeparture. SeeAmendedMotion¶¶ 1(f)-(l). Finally, Hillcontendsthathisattorneydeniedhimeffectiveassistanceof counselbecausehefailedtoprovideHill'srightofappealafterHillrequestedhimtodo so. SeeAmendedMotion1(m). ¹

Togainreliefforineffectiveassistanceofcounsel, adefendantmustsatisfythe two-prongedtestannouncedin Stricklandv.Washington, 466U.S.668(1984). The defendantmustshowthat:“(1)counsel'srepresentationfellbelowanobjective

¹Inhisamendedmotion, Hillalsoassertedthathissentencingcounselprovided himconstitutionallyineffectiveassistancebecausehefailedfullytoinformHillofthe termsofthepleaagreementandfailedtoinsurethatHillfullyunderstoodthe agreement. SeeAmendedMotion¶¶1(a),(b). However, Hillwithdrewthesetwo groundsforreliefonrecordattheAugust21, 1997evidentiaryhearing. Theseissues, therefore, arenotpresentlybeforethecourt.

standard of reasonableness under prevailing professional norms; and (2) the defendant suffered prejudice as a result--that is, there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." Sistrunk v. Vaughn, 96 F.3d 666 (3d Cir. 1996) (quoting Strickland v. Washington, 466 U.S. at 688). The court must be "highly deferential" to counsel's decisions and there is a "strong presumption" that counsel's performance was reasonable. See United States v. Kauffman, 109 F.3d 186, 189 (3d Cir. 1997) (quoting Strickland, 466 U.S. at 689). "It is[] only the rare claim of ineffective assistance of counsel that should succeed under the properly deferential standard to be applied in scrutinizing counsel's performance." Id. (quoting United States v. Gray, 878 F.2d 702, 711 (3d Cir. 1989)).

A. Petitioner's Status as a "Career Offender"

In applying the first prong of Strickland's two-part test, the court must determine whether Hill's sentencing counsel exercised reasonable professional judgment in deciding not to challenge the government's characterization of Hill as a "career offender" under the United States Sentencing Guidelines ("the Guidelines").

The Guidelines embody the conviction that a defendant who has a record of prior criminal behavior is more culpable than a first-time offender and deserves greater punishment. See United States Sentencing Commission, Guidelines Manual, Ch. 4, Pt. A, intro. comment. (Nov. 1995). A defendant's prior criminal history is one factor that determines the appropriate range of his sentence. Section 4A1.1 of the Guidelines sets forth a scheme for determining a defendant's criminal history category. Higher category

numbers correspond to more extensive criminal records. Under this section, a defendant may get assigned a category number I to VI. See id. §4A1.1.

If a defendant is a “career offender,” however, he automatically gets assigned the highest criminal history category, Category VI. See USSG §4B1.1. Section 4B1.1 provides that a defendant is a career offender if:

- (1) the defendant was at least eighteen years old at the time of the instant offense;
- (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
- (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

USSG §4B1.1. Section 4B1.2(1) defines the term “crime of violence”:

- The term ‘crime of violence’ means any offense under federal or state law punishable by imprisonment for a term exceeding one year that:
- (i) has an element the use, attempted use, or threatened use of physical force against the person of another, or
 - (ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG §4B1.2(1). The sentencing court adopted the factual findings and guideline recommendations in the PSI Report, which considered Hill a “career offender” because he had been convicted of three crimes of violence: (1) attempted robbery; (2) indecent assault; and (3) aggravated assault. See PSI Report ¶57; Sentencing at 3. Hill contends that his sentencing counsel should have challenged the use of the first two convictions as predicate offenses for Hill’s career offender status.

1. Petitioner’s Prior Conviction for Attempted Robbery

At issue here is the scope of the term “crime of violence.” Hill argues that this

attorney's "failure to challenge the characterization of Mr. Hill's attempted robbery conviction as a crime of violence" denied Mr. Hill his right to effective assistance of counsel." Herbert Hill Jr.'s Brief in Support of Amended Motion to Vacate, Set Aside, or Correct Sentence ("Petitioner's Brief") at 7. Hill contends that the 1994 version of the Guidelines defines the term "crime of violence" differently from the 1995 version. Hill concedes that the 1995 version specifically defines the term to include inchoate offenses, such as criminal attempts. Hill argues, however, that the 1994 version does not similarly expand the definition of the term. See id. at 8-9.

Hill reasons that if he were sentenced under the 1994 version of the Guidelines, his conviction for attempted robbery would not qualify as one of two predicate felony offenses necessary to make him a "career offender." See id.² He contends that the court's reliance on the 1995 version therefore resulted in an ex post facto sentence enhancement, and that the court should have sentenced him in accordance with the 1994 version. See id. at 8 n.8. ³ His attorney's failure to raise this argument at

² Because the 1994 version does not provide an expansive definition of the term "crime of violence," Hill argues, the sentencing court should have looked to the underlying facts of Hill's prior conviction for attempted robbery to determine whether this attempted robbery was, in fact, a violent crime. He contends that there would have been insufficient basis for the court to conclude that the attempted robbery was a "crime of violence" within the meaning of the career offender guideline. See Petitioner's Brief at 7-10.

³ A sentencing court ordinarily uses the "Guidelines Manual in effect on the date that the defendant is sentenced." USSG § 1B1.11(a). Because Hill was sentenced on December 13, 1995, the court sentenced Hill in accordance with the 1995 Edition of the Guidelines.

However, if the court "determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines manual in effect on the date that the offense of conviction was committed." USSG § 1B1.11(b)(1). Hill argues

sentencing, Hill contends, denied him effective assistance of counsel. See id. at 9-10. ⁴

The crux of this argument rests on Hill's reading of the 1994 version of the Guidelines. At first glance, the 1994 version seems to provide an expansive definition of the term "crime of violence," just like the 1995 version does. Application Note 1 of the Commentary to §4B1.2 ("Application Note 1") states that "[t]he term[]" 'crime of violence' ... include[s] the offenses of aiding and abetting, conspiring, and attempting to commit [any enumerated crime of violence]." USSG §4B1.2, comment. (n.1) (Nov. 1994). Commentary of this type, which "interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or plainly erroneous reading of, that guideline." Stinson v. United States, 508 U.S. 36, 37 (1993). Under a plain reading of the commentary in the 1994 version of the Guidelines, therefore, Hill's conviction for attempted robbery clearly constitutes one of two crimes of violence that are necessary to make him a career offender.

Hill argues, however, that this Application Note is not valid. Hill bases his argument on the opinion of the Court of Appeals for the District of Columbia ("DC

that this section applies in this case.

⁴In his amended motion, Hill also contended that his sentencing counsel denied him effective assistance by failing to argue that Hill's conviction for attempted robbery was not a felony. See Amended Motion ¶1(c)(1). However, Hill withdrew this ground for relief on record at the August 21, 1997 evidentiary hearing.

It should be noted that a defendant in a federal sentencing proceeding has only a limited right to attack collaterally the validity of previous state conviction that are used to enhance his sentence. See Custis v. United States, 511 U.S. 485 (1994). However, Hill does not argue that his counsel should have attacked the validity of Hill's attempted robbery conviction. Rather, he faults his counsel for failing to challenge the government's claim that Hill's attempted robbery conviction constitutes a "crime of violence" within the meaning of the career offender guideline.

Circuit”) in United States v. Price, 990 F.2d 1367 (D.C. Cir. 1993). In Price, the court considered whether the Sentencing Commission had authority to adopt Application Note 1. This Application Note expands the definition of the term “controlled substance offense” to include inchoate offenses, just as it expands the definition of the term “crime of violence.” See USSG § 4B1.2, comment. (n.1). Specifically at issue in Price was the Commission’s authority to define the term “controlled substance offense” to include conspiracies to commit such offenses.

The D.C. Circuit held in Price that the Sentencing Commission exceeded its statutory authority under 28 U.S.C. § 994(h) when it included conspiracies in Application Note 1.⁵ The court reasoned that, in enacting the career offender sections

⁵Section 994 of Title 28 U.S.C. codifies the duties of the Sentencing Commission and details the type and nature of the guidelines the Commission is to issue. Congress wanted to “ensure that recidivist violent and drug offenders received stiffer sentences, near the maximum term authorized for each crime, to remove such dangerous offenders from the streets and to deal more effectively with the growing problem of violent crime.” Parson, 955 F.2d at 864. This mandate was enshrined in § 994(h), which provides:

The Commission shall assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and--

(1) has been convicted of a felony that is--

(A) a crime of violence; or

(B) an offense described in section 401 of the Controlled Substances Act..., sections 1002(a), 1005, and 1009 of the Controlled Substances Import and Export Act..., and section 1 of the Act of September 15, 1980...; and

(2) has previously been convicted of two or more prior felonies, each of which is--

(A) a crime of violence; or

(B) an offense described in [these sections listed in (1)(B)].

28 U.S.C. § 994(h).

of the Guidelines, the Commission relied exclusively on its narrow promulgation authority under 28 U.S.C. § 994(h), rather than its broad promulgation authority under other subsections of § 994. The court explained that a conspiracy to commit a controlled substance offense specified in § 994(h) “cannot be said to be one of the offenses’ described in those sections.” Price, 990 F.2d at 1369. The court concluded that because “the Commission...acted explicitly upon grounds that [id] not sustain its action,” Application Note 1 could not support the petitioner’s sentence as a career offender. Id. at 1370.

In 1995, the Sentencing Commission repromulgated Application Note 1 “without change” in Amendment 528 to the Guidelines. At that time, the Commission also inserted additional background commentary in § 4B1.1. See Amendment 528, USSG App. C, at 434-35 (Nov. 1995). The commentary explains the Commission’s “rationale and authority” for implementing the career offender guideline:

[I]n accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified the definition [of career offender]... to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct....’

§ 4B1.1, comment. (backg’d) (citation omitted). Hill argues that this amendment shows that the Sentencing Commission “recognized the invalidity of Application Note 1 as it existed at the time” he committed the May 2 bank robbery. See Petitioner’s Brief at 9.

In Hill’s view, the amendment supports his argument that, although his attempted robbery conviction constitutes a predicate offense for sentence enhancement under the 1995 version of the Guidelines, it does not constitute a predicate offense under the

1994 version. See id. Hill contends that this attorney's failure to challenge his career offender status on this ground constitutes ineffective assistance of counsel. See id.

The court finds that Hill's argument is without merit. Although inchoate crimes do not constitute predicate offenses for sentence enhancement under the DCCircuit's interpretation of the 1994 career offender guideline, they do constitute predicate offenses under the Third Circuit's reading of this guideline. Congress did not specifically define the term "crime of violence" in §994(h) to include inchoate offenses. However, the Third Circuit has held that the Sentencing Commission has the statutory authority to expand the scope of the term beyond that of the original congressional definition. See United States v. Parson, 955 F.2d 858 (3d Cir. 1992). According to the court, §994(h) serves "as a floor for the career offender category, not as a ceiling." Id. at 867.

In United States v. Hightower, 25 F.3d 182 (3d Cir. 1994), cert. denied, 513 U.S. 952 (1994), moreover, the Third Circuit considered the Commission's authority to expand the category of career offenders by including inchoate crimes within the meaning of "controlled substances offenses." The court adopted the position taken by the majority of circuits and disagreed with Price, concluding that the Sentencing Commission had authority to expand the definition of "controlled substance offenses" to include inchoate offenses in the 1994 version of Application Note 1. ⁶The court

⁶With the exception of the Fifth Circuit, every court of appeal has rejected Price. See United States v. Piper, 35 F.3d 611 (1st Cir.), cert. denied, 115 S.Ct. 1118 (1995); United States v. Jackson, 60 F.3d 128 (2d Cir. 1995); United States v. Kennedy, 32 F.3d 876 (4th Cir. 1994), cert. denied, 115 S.Ct. 939 (1995); United States v. Williams, 53 F.3d 769 (6th Cir. 1995); Boyer v. United States, 55 F.3d 296 (7th Cir. 1995); United States v. Mendoza-Figueroa, 65 F.3d 691 (8th Cir. 1995); United States

approvingly cited the reasoning of the Court of Appeals for the Ninth Circuit that § 994(h) is “not [the Commission’s] sole legal authority for promulgating the career offender guidelines.” Hightower, 25 F.2d at 186 (quoting United States v. Heim, 15 F.3d 830, 832 (9th Cir. 1994) (emphasis in original)). It also noted that “the Commission’s decision to go beyond the mandate of § 994(h) is...consistent with the legislative history to § 994(h).” Id. (quotation omitted). The court concluded that the commentary’s expansion of the term “controlled substance offense” to include inchoate offenses in the 1994 version of the guidelines was binding. See id. at 187.

Under the court’s reasoning in Parson and Hightower, the commentary’s expansion of the term “crime of violence” to include criminal attempts is similarly binding. See also United States v. Preston, 910 F.2d 81, 86 n.6 (3d Cir. 1990) (assuming the validity of the commentary’s inclusion of inchoate offenses within the meaning of “crime of violence,” and drawing upon the Sentencing Guideline approach to support its holding expanding the scope of the term “violent felony” in 28 U.S.C. § 924(e) to include inchoate offenses). Because the commentary to the 1994 version of the Guidelines expressly provides that an attempted robbery conviction constitutes a “crime of violence,” see § 4B1.2, comment. (nn. 1, 2), and because the commentary is constitutionally valid, “a more detailed inquiry into the underlying facts [of the state court conviction] is inappropriate.” United States v. McQuiklin, 97 F.3d 723, 728 (3d Cir. 1996) (quotation omitted).

v. Newland, 116 F.3d 400 (9th Cir. 1997); United States v. Allen, 24 F.3d 1180 (10th Cir.), cert. denied, 115 S.Ct. 493 (1994); United States v. Weir, 51 F.3d 1031 (11th Cir. 1995). But see United States v. Bellazerius, 24 F.3d 698 (5th Cir.), cert. denied, 513 U.S. 954 (1994).

The court finds that the 1994 version of the Sentencing Guidelines is no more favorable to Hill than the 1995 version; under both versions, Hill's attempted robbery conviction constitutes a crime of violence within the meaning of §§ 4B1.1 and 4B1.2. The court thus holds that Hill's sentencing attorney did not deny Hill effective assistance of counsel by failing to challenge the court's use of his attempted robbery conviction to enhance his sentence under the career offender guideline.

2. Petitioner's Prior Related Convictions for Indecent Assault

a. "Crime of Violence"

On June 26, 1993, Hill was convicted of assaulting his five-year-old daughter. This court used Hill's indecent assault conviction to enhance his sentence under § 4B1.1. Hill contends that his sentencing counsel denied him effective assistance by failing to argue that this conviction was not a "crime of violence" within the meaning of the sentencing guideline. See Amended Motion ¶ 1(c)(3). ⁷

At the August 21 hearing, Hill testified that his indecent assault conviction should not be considered a "crime of violence" because it was "just a misunderstanding." He claims that he and his sister got into an argument over money, and that his sister told the police that Hill had assaulted his daughter as a "way of getting back at [him]" for not

⁷ Hill was convicted of corrupting the morals of a minor, indecent exposure, simple assault, and endangering the welfare of a child, in addition to indecent assault. See PSI ¶ 63. However, with respect to this claim, Hill challenges only the indecent assault conviction. See Amended Motion 1(c)(3).

In his amended motion, Hill also contends that his sentencing counsel should have argued that the indecent assault was not a felony, as defined in the guidelines. See Amended Motion, ¶ 1(c)(1). However, Hill withdrew this ground for relief on record at the August 21, 1997 evidentiary hearing.

giving her money." Hill contends that "the only reason that he entered a guilty plea to the indecent assault... was because it involved allegations of assault against this young daughter, was a significant source of embarrassment for his family, and he desired expediently to resolve the matter without further embarrassment to his family or stress to his young daughter, notwithstanding the fact that he did not actually commit those offenses." Petitioner's Brief at 6-7. Hill was sentenced to serve three to twenty-three months for the offense. His exculpatory testimony now is not credible.

Hill's sentencing counsel, moreover, testified that he investigated the incident and discussed it with a Ms. Eloise Hill, the defendant's mother or sister, who told him that the family would testify that the events occurred as stated in the police report. Hill's sentencing counsel credibly testified that he advised Hill that if Hill wanted to pursue this argument at sentencing, he would have to put his daughter on the stand, but that it would be harmful to him with reference to other issues if he did so. Hill's sentencing counsel credibly testified that Hill ultimately agreed with this advice and that the issue was not pursued. Counsel's decision not to challenge the inclusion of the assault convictions in the career offender calculation was therefore reasonable.

Even if Hill's sentencing counsel had argued at the sentencing hearing that Hill's indecent assault conviction was not a crime of violence, moreover, the court would have rejected this claim. The police report indicates that Hill's brother and sister both told the police that Hill had sexually assaulted his five-year-old daughter. See Philadelphia Police Department Investigation Report, dated September 3, 1993. At the hearing, Hill's probation officer, Leon King, testified that Hill's sentencing report reveals that Hill was found guilty after an "open stipulated trial" before Judge Nicholas D'Alessandro,

rather than after entering a guilty plea. The record from the Philadelphia Municipal Court was exhibited to this court, but was not made part of this record. It confirms that Hill pleaded not guilty on November 1, 1993 and that he was found guilty after an “open stipulated” trial. The court credits this version of the facts and finds that Hill’s version lacks credibility. Thus, there could be no prejudice to Hill.

b. Constitutionality and Reliability

Hill contends that his sentencing counsel denied him effective assistance by failing to challenge the constitutionality and reliability of his convictions for indecent assault, corrupting the morals of a minor, indecent exposure, simple assault, and endangering the welfare of a child (“related assault convictions”). Specifically, he contends that his counsel should have argued that these convictions were unconstitutional and unreliable because he pleaded guilty to them without being apprised of his right against self-incrimination. See Amended Motion ¶¶ 1(d), (e). At the August 21 hearing, Hill testified that he was convicted of these crimes after pleading guilty and that “when [he] pled guilty, [he] wasn’t advised of [his] constitutional rights.” Hill claims to have pleaded guilty because he did not want the “embarrassment of having [his] daughter... take the stand and also other family members when it was just a misunderstanding.” Hill’s sentencing counsel testified that he, too, was under the impression that Hill had pleaded guilty to these charges and that Hill had told him that Hill had not been aware of his right against self-incrimination.

The argument that Hill’s conviction was obtained in violation of his constitutional right against self-incrimination, however, would have been meritless. The Supreme

Court has held that, except when a conviction is obtained in violation of a defendant's right to counsel, a defendant has no constitutional or statutory grounds collaterally to attack the validity of previous state convictions used to enhance his sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e). See Custis v. United States, 511 U.S. 485, 496-97 (1994). The Third Circuit has similarly held that when a district court sentences a defendant who is classified as a career offender under § 4B1.1, it cannot entertain a constitutional challenge to the underlying convictions, except in a case in which the defendant's right to counsel has been denied. See United States v. Thomas, 42 F.3d 823, 824 (3d Cir. 1994). Because Hill was represented by counsel at his assault trial, his sentencing counsel could not have challenged the constitutionality of Hill's assault convictions at the sentencing hearing on the instant charge. His failure to pursue a meritless claim does not constitute ineffective assistance of counsel. ⁸

Hill also invokes Townsend v. Burke, 334 U.S. 736 (1948), for the proposition that a court "may only use reliable information in determining a sentence." Amended Motion ¶ 1(e). He argues that his sentencing counsel should have challenged the reliability of Hill's prior related assault convictions under Townsend. See id. However, Hill mischaracterizes the Court's holding in that case. In Townsend, the Court held that the defendant's Fourteenth Amendment Due Process right had been violated because

⁸Even if Hill's sentencing counsel could have challenged the constitutionality of Hill's conviction based on these grounds, he would have lost. At the August 21 hearing, the parties stipulated that there is no transcript available from the prior state proceeding. However, probation officer Leon King testified that the sentencing sheet indicates that Hill was convicted of indecent assault after an "open stipulated trial" before Judge Nicholas D'Alessandro, and not after entering a guilty plea. The court credits this testimony and the Philadelphia court record exhibited to it at the hearing, and finds that Hill was convicted after a trial, not a guilty plea.

he had been sentenced “while at a disadvantage[d] by lack of counsel... on the basis of assumptions concerning his criminal record which were materially untrue.” Id. at 740-41.

The Court’s decision in Townsend has been limited by Custis. Hill’s sentencing counsel could have challenged the constitutionality of Hill’s prior related assault conviction only if Hill had been denied counsel at this assault trial. Because Hill was represented by an attorney at that trial, his sentencing counsel could not have raised a Townsend Due Process claim. His failure to raise this claim, therefore, did not constitute ineffective assistance of counsel.

B. Motion for Downward Departure by Defense Counsel

1. Coercion and Duress

Hill contends that his sentencing counsel should have filed a motion for downward departure under § 5K2.12 on the grounds of coercion and duress. See Amended Motion ¶ 1(f). Hill argues that he acted under duress and coercion when he committed the May 2 robbery. He asserts that he needed money to repay a loan shark and feared that if he did not obtain the money soon, the loan shark would harm him or his family. See Petitioner’s Brief at 10. Hill further contends that his sentencing counsel should have presented psychiatric or psychological testimony to the sentencing court to support this motion. See Amended Motion ¶ 1(g).

The court finds that counsel’s decision not to file a § 5K2.12 motion was an exercise of “reasonable professional judgment.” Counsel credibly testified at the hearing that he did not pursue this ground for downward departure because he did not

have any evidence to support Hill's contentions and did not want to put Hill on the stand because Hill's lack of credibility on this issue might hurt him on other issues. Hill did not provide him with any details as to the identity of the loanshark or tell him about any specific threats made by the loanshark.

The court also finds that Hill's attorney did not deny Hill effective assistance of counsel by failing to present psychiatric or psychological testimony to support a § 5K2.12 motion. Hill has not demonstrated that his counsel's failure to present this testimony was objectively unreasonable or that it caused Hill any prejudice. He has indicated neither what such testimony would have revealed, nor how it would have assisted the court. The court finds that Hill's contentions are without merit.

2. Injury as a Result of Hill's Cooperation with the Government

Hill contends that his sentencing counsel should have filed a motion for downward departure under § 5K2.0 "based on the fact that Mr. Hill was injured while incarcerated in an assault by another inmate... as the result of his attempts at providing cooperation to the government." Amended Motion ¶ 1 (j). Hill testified that while he was incarcerated in Lehigh County Prison, he telephoned his counsel to tell him about some allegedly incriminating statements made by another inmate, and that he was subsequently "hit and injured" by a third inmate who overheard Hill informing on his friend.

The court finds that Hill's testimony as to the cause of his injuries is not credible. Even if the court were to find that Hill was injured because he cooperated with the government, however, the court would still reject his ineffective assistance of counsel

claim. Section 5K2.0 is a policy statement that provides, in relevant part:

Under 18 U.S.C. § 3353(b) the sentencing court may impose a sentence outside the range established by the applicable guideline, if the court finds 'that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guideline that should result in a sentence different from that described.

USSG § 5K2.0, p.s. (quotation omitted). The court would not have granted a motion to depart downward under this section because Hill's injuries were minimal. Thus, Hill has not demonstrated that he has suffered any prejudice as a result of his sentencing counsel's failure to bring the motion.

3. Overstatement of the Seriousness of Hill's Offense and the Extent of Hill's Culpability

Hill contends that his sentencing counsel should have filed a downward departure motion under § 5K2.0 "based on the argument that the guideline range determined to be applicable overstated the seriousness of his offense and the need to correct him." Amended Motion ¶ 1(k). He contends that the guideline range overstated the seriousness of his offense because there was "no weapon and no harm." The court finds that Hill's claim is without merit and that it would have denied such a motion. Hill, therefore, suffered no prejudice as a result of his sentencing counsel's failure to file this motion.

He also contends that his counsel should have filed a downward departure motion under § 4A1.3 "based on the argument that a criminal history category VI overrepresented Mr. Hill's culpability." Amended Motion ¶ 1(l). The career offender guideline, however, provides that "[a] career offender's criminal history category in every

caseshallbe Category VI.” USSG § 4B1.1 (emphasis added). Counsel’s failure to file such a motion, therefore, was neither unreasonable nor prejudicial.

C. Motion for Downward Departure by the Government

Hill argues that he did not receive the “full benefit of the plea agreement bargained for, and the Court did not receive all information which it was entitled to receive” because his sentencing counsel failed to ensure that the government advised the sentencing court of the details of Hill’s cooperation, as required by the agreement. See Amended Motion ¶ 1 (h). Hill also contends that his sentencing counsel either should have urged the government to file a downward departure motion under § 5K1.1, or should have filed a motion with the court to compel the government to file a § 5K1.1 motion. See Amended Motion ¶ 1 (i).

Section 4 of the plea agreement between Hill and the government provides:

If the Government in its sole discretion determines that the defendant has fulfilled his obligation of cooperation as set forth above, then at sentencing, the government will:

- a. Make the nature and extent of the defendant’s cooperation known to the Court.
- b. Make a motion to allow the Court to depart from the Sentencing Guidelines pursuant to Sentencing Guidelines § 5K1.1., if the government, in its sole discretion, determines that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense; the filing of such motion, however, will not obligate the government to recommend a downward departure from the sentencing guidelines.

Guilty Plea Agreement, § 4 (emphases added).

The failure of Hill’s sentencing counsel to urge the government to notify the court of the details of Hill’s cooperation, pursuant to § 4(a) of the plea agreement, did not

deny Hill effective assistance of counsel because the court sentenced Hill at the low end of the guidelines, and Hill therefore suffered no harm.

The court also rejects Hill's other contentions. At the August 21 hearing, Hill described the extent of his cooperation with the government. Hill's sentencing counsel testified that he did not contest the government's decision not to file a § 5K.1 motion because he did not think that the court would have granted the motion based on the information that Hill provided. The court finds that Hill did not merit a § 5K.1 motion because his information was very generic and because the government was unable to confirm most of Hill's tips. Moreover, the government's decision whether to file this motion is within its "sole discretion." See Plea Agreement § 4(b). Neither Hill's sentencing counsel nor the court could have compelled the government to file the motion. See USSG § 5K1.1 (" Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."). Therefore, Hill has not demonstrated deficient performance and sufficient prejudice necessary to satisfy his ineffective assistance of counsel claim.

D. Failure to Perfect Petitioner's Right of Appeal

Hill contends that his sentencing counsel was ineffective for failing to file a notice of appeal. At the August 21 hearing, Hill testified that he requested his sentencing counsel to perfect an appeal. However, his sentencing counsel testified that, after he discussed the advantages and disadvantages with Hill, Hill decided not to appeal. The court credits counsel's testimony, and finds that Hill elected not to appeal after

discussion with his attorney.

II. BREACH OF THE PLEA AGREEMENT

Hill contends that he is entitled to relief under § 2255 because the government breached the plea agreement. See Amended Motion ¶¶ 2, 3. He argues that the government breached the agreement by failing to advise the sentencing court of the details of Hill's cooperation and by failing to file a downward departure motion under USSG § 5K1. See id. Because Hill failed to present this issue at the sentencing hearing and on direct appeal, he must show cause and prejudice to excuse his failure. See Frady, 456 U.S. at 167; Essig, 10 F.3d at 979.

The cause and prejudice standard may be satisfied by showing that Hill's counsel was constitutionally ineffective for failing to raise this issue at sentencing. See Murray v. Carrier, 477 U.S. 478, 488 (1986); Ramos, 1997 WL at *4. The court concludes that Hill has not made such a showing in this case. See supra Part I.C. Even if Hill had shown cause and prejudice, however, his claim would fail on the merits. See id. This claim is therefore denied.

III. PETITIONER'S PRIOR RELATED ASSAULT CONVICTIONS

Hill argues that his prior related assault convictions were unconstitutionally obtained and therefore cannot serve as predicate offenses for his enhanced sentence under § 4B1.1. See Amended Complaint ¶¶ 4, 5. Specifically, he contends that he pleaded guilty to these crimes without knowingly and voluntarily waiving his right against self-incrimination. He argues that he entered the guilty plea not because he was, in

fact, guilty, but because he wanted to avoid further embarrassment for his family. See id. Hill cites Maleng v. Cook, 490 U.S. 488 (1989), for the proposition that a §2255 motion is the proper way to attack the constitutionality of a prior conviction used to enhance a later sentence. The government counters that under Custis v. United States, 511 U.S. 485 (1994), Hill may not raise this claim.

In Maleng v. Cook, 490 U.S. 488 (1989), the Court considered whether a habeas petitioner remains “in custody” under a conviction after the sentence imposed for it has fully expired, merely because that conviction might be used to enhance a future sentence. The habeas petitioner at issue had been convicted of robbery in 1958 in state court, and had been sentenced to 20 years of imprisonment. In 1978, after his 1958 sentence had expired, the petitioner was convicted of two counts of assault and one count of aiding a prisoner to escape. Pursuant to state law, his 1958 conviction increased the mandatory minimum prison term that he received for his 1978 convictions. See id. at 489. The prisoner filed a pro se petition for habeas relief under 28 U.S.C. §2254, alleging that his 1958 conviction had been illegally used to enhance his 1978 sentences. See id. at 490. The court of appeals reversed the district court’s dismissal of his petition. See id.

On grant of certiorari, the Court held that the petitioner had not remained “in custody” after his 1958 sentence had expired and, therefore, there was no jurisdiction to challenge his 1958 conviction under §2254, even though that conviction had been used to enhance the later state sentences for which he was “in custody.” See id. at 492.

The Court held, however, that the district court did have jurisdiction to hear the

prisoner's challenge under §2254 if it construed his petition as "asserting a challenge to [his later sentences], as enhanced by [his] allegedly invalid prior conviction...." Id. at 493. The Court expressly noted that its holding was "limited to the narrow issue of 'custody' for [the purpose of establishing] subject-matter jurisdiction of the habeas court." Id. at 494. The Court "express[ed] no view on the extent to which the [prisoner's prior conviction] itself [could] be subject to challenge in the attack upon the [later] sentences which it was used to enhance." Id.

Five years later in Custis, the Court held that, at his sentencing on a federal offense, a defendant has no constitutional or statutory right collaterally to attack the validity of previous state convictions that are used to enhance his sentence under the Armed Career Criminal Act of 1984, except when a conviction is obtained in violation of the defendant's right to counsel under Gideon v. Wainwright, 372 U.S. 335 (1963). See Custis, 511 U.S. at 496. Following the lead of the Court, the Third Circuit held that when sentencing a defendant classified as a career offender under §4B1.1 of the Sentencing Guidelines, a federal district court cannot entertain a constitutional challenge to the predicate convictions, except in a case in which the defendant's right to counsel has been denied. See United States v. Thomas, 42 F.3d 823 (3d Cir. 1994).

A number of courts have extended Custis's rationale to §2255 proceedings as well, holding that a defendant may raise only Gideon claims in a §2255 collateral attack on a prior conviction used to enhance a later federal sentence. See Charlton v. E.W. Morris, 53 F.3d 929, 929-30 (8th Cir. 1995) ("Even if Charlton's petition were construed as a 28 U.S.C. §2255 motion attacking his current federal sentence, as enhanced by his state conviction, ... we note that he may not use such a motion to challenge his

priorexpiredstateconvictiononthegroundsalleged.”); Clawsonv.UnitedStates ___,52 F.3d806,809(9thCir.), cert.denied,116S.Ct.252(1995)(“Following Custis,thereis noconstitutionalrighttocollaterallychallenge theconstitutionalityofapriorconviction foranyreasonotherthandeprivationofthe Gideonrighttocounsel.”); Bernalv. Helman,958F.Supp.349,356(N.D.Ill.1997)(holdingthataalthoughSeventhCircuit precedentpermitsnon- Gideonchallengestopriorexpiredenhancingconvictionsunder §2254, “[d]ifferencesbetween§2254and §2255...mitigateagainstextendingtherightofderivativecollateralattacktothe latter”); Glennv.Holland ___,1996WL92099,*2(E.D.Pa.)(“[C]onsistentwith Custisa prisoner maynotcollaterallyattack[ina§2255proceeding]apriorexpiredenhancing sentenceunderwhichheisnot'incustody'exceptfora failuretoprovidecounselas requiredbyGideon ___.”).Nocourthasheldtothecontrary.

TheThirdCircuithasnotaddressedtheissueinthe§2255context.However,it hasruledthataprisonermayusea§2254petitiontoattackapriorexpiredstate convictionthatisusedtoenhancehiscurrentstatesentence,evenifhedoesnotclaim thathewasdeniedtherighttocounselinthe proceedingsresultingintheexpired conviction.In Youngv.Vaughn ___,83F.3d72(3dCir.1996), cert.denied,117S.Ct.333 (1996),thecourtconcludedthat Custiswas“clearlypremisedonthefactthatcollateral attacksbasedon...defects[otherthandenialoftherighttocounsel]maybeheardon habeasreview.” Young,83F.3dat77(quotationomitted)).Thecourtheldthat“a prisoner mayattackhiscurrent[state]sentencebya[§2254]...challenge tothe constitutionalityofanexpired[state]convictionifthatconvictionwasusedtoenhance hiscurrentsentence.” Id.at78.

Whether the Third Circuit will apply the broad language of Young to a §2255 proceeding is an open question. If it did, however, it would lead to the incongruous result that a defendant who is prosecuted for a federal offense could not challenge his prior state convictions used to enhance his sentence at his sentencing under Custis, but then would be allowed to do so in a subsequent collateral attack under §2255. Likewise, the Supreme Court has not yet decided the issue, either in the §2254 context dealt with in Young, or in the §2255 context at issue here.

Fortunately, it is not necessary to resolve these conflicts. Assuming, without deciding, that Hill can attack the constitutionality of his prior expired state assault convictions in this §2255 proceeding, and that Hill does not need to exhaust his state remedies before challenging his state convictions in this court, ⁹his argument fails on the merits. Hill was convicted of the related assault charges after an open stipulated trial, not after a guilty plea as he now contends, so that the factual predicate for his claim is faulty. In addition, there is no evidence showing that his convictions were unreliable. See discussion supra Part I.A.2.b. Moreover, even if Hill could succeed on this claim--which he plainly cannot--he could not gain relief under §2255 because he

⁹There is precedent suggesting that Hill needs to exhaust his state remedies for his expired state convictions before he can challenge them in this §2255 proceeding. See Custis v. United States, 923 F. Supp. 768, 768 (D. Md. 1996), aff'd, 105 F.3d 649 (4th Cir. 1997) (invoking the “well-settled principles of comity that require the satisfaction of the exhaustion rule prior to federal collateral review of state convictions” under §2254, and holding that “unless and until state remedies are exhausted regarding...[a petitioner's prior state] convictions, there should be no collateral attacks considered on them under section 2255, as a matter of law”); cf. Young, 83 F.3d at 78 (holding that the district court had jurisdiction to entertain Young's §2254 petition challenging the constitutionality of his current sentence, as enhanced by his prior expired state court convictions, but “express[ing] no opinion as to whether Young ha[d] exhausted his state court remedies” for these convictions).

has committed two other predicate offenses within the meaning of the career offender sentencing guideline. See discussion supra Part I.A.

Conclusion

Hill has failed to demonstrate that his sentence is marked by a “fundamental defect which inherently results in a complete miscarriage of justice.” Hill v. United States, 368 U.S. 424, 428 (1962). He has failed to show that his sentencing counsel provided him ineffective assistance of counsel; that the government breached the plea agreement; and that his prior related assault convictions are unconstitutional. His motion is therefore denied.

An appropriate order follows.